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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-111

LUCIO P. SALVUCCI,
PETITIONER,
v.
NEW HAMPSHIRE JOCKEY CLUB, INC., et al.,
RESPONDENTS.

LUCIO P. SALVUCCI and LINDA M. SALVUCCI,
PETITIONERS,
v.
NEW HAMPSHIRE JOCKEY CLUB, INC., et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The Order of the United States District Court for the District of New Hampshire (Petition at 4a and 5a) has

not been reported. The Memorandum and Order of the United States Court of Appeals for the First Circuit (Petition at 1a and 2a) is reported as a decision without published opinions at 530 F.2d 962 (1st Cir. 1976).

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on March 1, 1976. A petition for rehearing was denied on March 24, 1976, and a petition for certiorari was filed on June 17, 1976. This Court has jurisdiction under 28 U.S.C. §1254(1).

Question Presented

Whether the petitioners' copyrights on various wagering systems for horse and dog races are entitled to the protection of the federal copyright law, Title 17 of the United States Code.

Statutes and Regulations Involved

The pertinent provisions of the copyright law are as follows: 17 U.S.C. §1; 17 U.S.C. §5; 17 U.S.C. §8; 17 U.S.C. §9; and 17 U.S.C. §101 all of which are set forth in the Appendix and U.S. Proclamation 1934 Copyright – Argentina (Petition at 14a-16a).

Statement

This litigation has as its only legitimate issue the question whether the petitioners' copyrights on various wagering systems for horse and dog races are entitled to protection of the federal copyright law, Title 17 of the U.S. Code. The petitioners in 1962 allegedly copyrighted certain language relating to wagering systems which may be summarized as follows:

Tri–3 Double	Selection of positions 1, 2 and 3 in two races.
Tri–3	Selection of three finish positions in a single race.
Double–Double	Selection of positions 1 *and* 2 in two races.
Double–Quinella (sic)	Selection of positions 1 *or* 2 in two races.
Par–La–Lu	Selection of positions 1, 2, 3 and 4 in a single race.

The petitioners filed two complaints in the United States District Court for the District of New Hampshire alleging infringements of their copyrights by the defendants in their use of similar wagering systems at horse and dog racing establishments in New Hampshire, although the language used by the defendants varied significantly from that in the petitioners' copyrights.

The defendants moved to dismiss the complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Said motions were granted by the trial court: "It has long been established that ideas cannot be protected by copyright." (Petition at 5 a).

The defendant, Timothy Connors, Chairman of the New Hampshire Racing Commission, also moved to have the complaint dismissed as to him on the additional ground of sovereign immunity. Said motion was granted. No appeal was taken by the petitioners with regard to the defendant, Mr. Connors. See Notices of Appeal dated October 30, 1975, signed by Stephen T. Keefe, Jr., Esquire, attorney for petitioners.

The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court:

"As the district court correctly divined in its memorandum opinion accompanying its dismissal, plaintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it. A system of betting is an idea, or system. *Affiliated Enterprises* v. *Gruber*, 1st Cir. 1936, 86 F.2d 958. One acquires no protection in such by copyrighting a book about it. *Baker* v. *Selden*, 1880, 101 U.S. 99."

Argument

The decisions by the United States District Court for the District of New Hampshire and by the United States First Circuit Court of Appeals for the First Circuit are clearly correct. The petitioners have not set forth any legal argument to justify this Court granting their petition for writ of certiorari.

Both the District Court and the Court of Appeals stated that a system of betting is an idea which is not protected by the copyright law. The petitioners argue that the mere expression of an author's idea is entitled to protection failing to understand that it is not the idea which is protected by the copyright but rather the style, distinctive word order, and originality of the wording of the written expression which the copyright law protects. *Baker* v. *Selden*, 101 U.S. 99, 25 L. Ed. 841 (1880); *Seltzer* v. *Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938); *Seltzer* v. *Corem*, 107 F.2d 75 (7th Cir. 1939). An idea as an intellectual concept can only be protected by a patent. *Affiliated Enterprises* v. *Gruber*, 86 F.2d 958 (1st Cir. 1936).

Even though there is a copyright, the idea, plan or scheme which is described therein may be used by another unless the idea, plan or scheme is protected by a patent. *Seltzer* v. *Sunbrock, supra; Seltzer* v. *Corem, supra.* In the treatise entitled *Copyrights* by B. Ringer and P. Gitlin

(1965) the status of the law regarding the issue before this Court was summarized at page 17:

"Copyright protects only the expression of an author's thoughts in some tangible form—words, music, pictures, dramatic action, or the like. The public cannot copy the author's expression, but it is free to use any of the ideas or principles on which its work is based or which are revealed in the work. Thus, copyright in a description of the format of a television quiz game, or in a scale drawing showing the construction of a camera, will protect the description or drawing as such, but will not prevent anyone from producing the quiz show or manufacturing a camera constructed the same way. The courts, especially in recent years, have shown an inclination to protect novel ideas under certain circumstances, on theories of breach of trust, breach of contract, or unfair competition, but this type of protection is not available under a statutory copyright."

The Copyright Office issues a publication entitled *General Information on Copyrights* wherein on page 4 it states what cannot be copyrighted: "Ideas, plans, methods, systems or devices, as distinguished from a description or illustration."

The petitioners also overlook a basic difference between a copyright and a patent in that copyright registration requires mere compliance with the formalities set forth in the statutes while patents are only issued after a thorough search by the Patent Office to see if the invention is "novel and useful." B. Ringer and P. Gitlin, *supra* at 2.

The petitioners give no consideration to the issue of whether the systems of wagering which they claim are protected by the copyright law are so elementary and

ordinary that they are in the public domain. The statute is clear that "No copyright shall subsist in the original text of any work which is in the public domain . . ." 17 U.S.C. §8; *Briggs* v. *New Hampshire Trotting and Breeding Association, Inc.*, 191 F. Supp. 234 (D.N.H. 1960). The matters which the petitioners claim to be subject to copyright are elementary. Any person who can count to six could suggest the alternatives posed by petitioners in their copyrights. The decision of the District Court in this case specifically relied on *Briggs, supra.*

The decisions cited by petitioners indicating that the federal courts are divided on the issue raised in this case do not support the petitioners' claim. Petitioners cite *Burrow-Giles Lithographic Company* v. *Napoleon Sarony,* 111 U.S. 53, 28 L. Ed. 349, 4 S. Ct. 279 (1883), as being inconsistent with the decision of the United States Court of Appeals for the Second Circuit in *Salvucci* v. *New York Racing Assn., et al.*, No. 76-7022 (2d Cir. April 21, 1976). (Petition at 12a and 13a). The issue in the *Burrow-Giles* case was whether a photograph of Oscar Wilde was a proper subject of a copyright which this Court determined that it was. The decision of the Second Circuit Court of Appeals in *Salvucci* in which it held that Salvucci was not entitled to copyright protection on wagering systems is in no way inconsistent with the *Burrow-Giles* case. The District Court for the Eastern District of New York found that even if the petitioner was correct that he was entitled to protection of the copyright law, "the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants." (Petition at 10a)

The petitioners cite the cases of *U. S.* v. *O'Malley,* 383 U.S. 627, 16 L. Ed. 2d 145, 86 S. Ct. 1123 (1966), and *U. S.* v. *Muniz,* 374 U.S. 150, 10 L. Ed. 2d 805, 83 S. Ct. 1850 (1963), for the proposition that if there is a conflict in the decisions of lower federal courts, this Court should act to resolve the issue. The respondents have no disagreement with this basic proposition; however, there is no conflict in decisions of the lower federal courts on the issue of whether wagering systems are entitled to protection of the copyright law. The decisions are consistently negative.

The petitioners argue that this Court should grant their petition because the lower courts' decisions ignored "copyright reciprocity laws." The petitioners suggest that the lower courts in this case ignored an international "treaty, proclamation, or bi-lateral agreement," presumably the 1934 Proclamation between the United States and Argentina, set forth at pages 14a-16a of the Appendix to the Petition. There is nothing in the petition which states how the Proclamation is in any way applicable to this case. In any regard there is nothing inconsistent in the lower courts' decisions and the Proclamation. During the hearing on the respondents' Motion to Dismiss, the petitioners argued that Argentina had granted and held enforceable a copyright on certain wagering systems belonging to a citizen of Argentina. This allegation has not been verified by the petitioners, but even assuming the petitioners are correct, the Proclamation referred to above does not require this country to alter its laws and recognize as valid a copyright on betting systems simply because Argentina so acted. Section (b) of the Proclamation is almost identical to 17 U.S.C. §9(b) which, likewise, does not support the petitioners' contention that wagering systems are protected by the copyright law. The reference to the 1934 Proclamation unnecessarily confuses the issue before this Court and is no basis upon which the petition for writ of certiorari should be granted.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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August 20, 1976

APPENDIX

Section 1. Exclusive rights as to copyrighted works. — Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably forseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method

be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section

shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs. (July 30, 1947, c. 391, § 1, 61 Stat. 652; July 17, 1952, c. 923, § 1, 66 Stat. 752.)

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, That this right

does not extend to the making of duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use. (As amended Oct. 15, 1971, P. L. 92-140, § 1(a), 85 Stat. 391.)

5. Classification of works for registration. — The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

(n) Sound recordings.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title. (July 30, 1947, c. 391, §1, 61 Stat. 654; as amended Oct. 15, 1971, P.L. 91-140, §1(b), 85 Stat. 391.)

8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications — Publication by Government or copyrighted material. — No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the United States Postal Service may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 405 of title 39 [39 § 405].

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor. (July 30, 1947, c. 391, § 1, 61 Stat. 655; Oct. 31, 1951, c. 655, § 16(b), 65 Stat. 716; Sept. 7, 1962, P.L. 87-646, § 21, 76 Stat. 446; Aug. 12, 1970, P.L. 91-375, §6(i), 84 Stat. 777).

9. Authors or proprietors, entitled — Aliens. — The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: Provided, however, That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only under the conditions described in subsections (a), (b), or (c) below:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: Provided, That whenever the President shall find the authors, copyright owners, or proprietors of works first produced or published abroad and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States: Provided further, That no liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully

undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require.

(c) When the Universal Copyright Convention, signed at Geneva on September 6, 1952, shall be in force between the United States of America and the foreign state or nation of which such author is a citizen or subject, or in which the work was first published. Any work to which copyright is extended pursuant to this subsection shall be exempt from the following provisions of this title: (1) The requirement in section 1(c) that a foreign state or nation must grant to United States citizens mechanical reproduction rights similar to those specified therein; (2) the obligatory deposit requirements of the first sentence of section 13; (3) the provisions of sections 14, 16, 17, and 18; (4) the import prohibitions of section 107, to the extent that they are related to the manufacturing requirements of section 16; and (5) the requirements of sections 19 and 20: Provided, however, That such exemptions shall apply only if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

Upon the coming into force of the Universal Copyright Convention in a foreign state or nation as hereinbefore provided, every book or periodical of a citizen or subject thereof in which ad interim copyright was subsisting on

the effective date of said coming into force shall have copyright for twenty-eight years from the date of first publication abroad without the necessity of complying with the further formalities specified in section 23 of this title.

The provisions of this subsection shall not be extended to works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication, or to works first published in the United States. (July 30, 1947, c. 391, § 1, 61 Stat. 655; Aug. 31, 1954, c. 1161, § 1, 68 Stat. 1030).

Section 101. Infringement. — If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction. — To an injunction restraining such infringement;

(b) Damages and profits. — Amount — Other remedies. To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of

an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) Impounding during action. — To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) Destruction of infringing copies and plates. — To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) Interchangeable parts for use in mechanical music-producing machines. — Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments, serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice. (As amended Oct. 15, 1971, P. L. 92-140, § 2, 85 Stat. 392.)

(f) [Repealed.] (July 30, 1947, c. 391, § 1, 61 Stat. 661; June 25, 1948, c. 646, § 39, 62 Stat. 992.)